Supreme Court, U.S.
FILED
JUN 30 2005
OFFICE OF THE CLERK

(3)

No. 04-1551

In The

Supreme Court of the United States

INTERMOUNTAIN SPORTS, INC.,

Petitioner,

vs.

UTAH DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For Writ Of Certiorari To The Utah Court Of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

B. RAY ZOLL
Counsel of Record
ZOLL & TYCKSEN, L.C.
5300 South 360 West
Suite 360
Murray, UT 84123
Telephone (801) 685-7800

Attorney for Petitioner Intermountain Sports, Inc.

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Introduction	1
Statement of Facts	1
Argument	2
This Court has jurisdiction to review the challenged decisions of Utah's courts concerning the United States Constitution because the federal claim was properly presented to the state courts	2
Conclusion	5

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT DECISIONS:

Armstrong v. United States, 364 U.S. 40, 80 S. Ct. 1563, 4 L.Ed.2d 1554 (1960) 2

Baldwin v. Reese, 541 U.S. 27, 124 S. Ct. 1347, 158 L.Ed.2d 64 (2004) 5

Howell v. Mississippi, ___ U.S. ___, 125 S. Ct. 856 (2005) 2, 3, 5

Intermountain Sports Inc. v. Utah Dept. of Transportation., Case No. 200441060-SC 2

Kelo v. City of New London, Conn., ___ S. Ct. ___, 2005 WL 1469529 1

Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889 (1981) 4

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment V 2, 4

Utah Constitution, Article I, Section 22 4

INTRODUCTION

The Petitioner has exhausted its judicial remedies in Utah seeking just compensation for the taking of its property under both state and federal constitutions. The Utah courts have had an appropriate opportunity to deal with this claim, and have failed to comply with this Court's precedent on the issue of taking private property without just compensation. Accordingly, the Court should grant certiorari.

Moreover, in light of recent adverse public opinion triggered by the Court's ruling in *Kelo v. City of New London, Conn.*, ___ S. Ct. ___, 2005 WL 1469529, whereupon the perception in the media and the public at large is that the state can now take property not only for public use, see Exhibit 1, attached, but also for private purposes, this case allows the Court an opportunity to clarify its ruling and any accompanying misperceptions. The media and general public have missed a crucial component of the ruling in *Kelo*, where just compensation is afforded a citizen. This case can set the standard of just compensation, clarify the misperception of the public, and set parameters for just compensation for legitimate economic losses.

STATEMENT OF FACTS

1. In an attempt to prevent this Court from reviewing the constitutional question presented in the Petition, the Respondent asserts that no federal claim was raised by the Petitioner before the Utah courts. This is not true, as the record indicates, the Petitioner sought relief from the Utah Supreme Court, pointing out the conflict with the United States Constitution:

> Like the analogous federal provision in the Fifth Amendment, the Utah Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." U.S. Const. Amend. V; *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

See Petition for Writ of Certiorari in *Intermountain Sports Inc. v. Utah Dept. of Transportation.*, Case No. 200441060-SC at 7.

ARGUMENT

This Court has jurisdiction to review the challenged decisions of Utah's courts concerning the United States Constitution because the federal claim was properly presented to the state courts.

In its brief in opposition to this petition, Respondent cites *Howell v. Mississippi*, ___ U.S. ___, 125 S. Ct. 856 (2005), to stand for the position that if a question is presented to a state court, and the claim for relief therein was based only on a state law, then this Court does not have jurisdiction to review the state supreme court's decision. The Petitioner does not contest that conclusion.

However, *Howell* supports granting certiorari. The Petitioner clearly brought to the attention of the Utah Supreme Court the conflict between precedent set by this Court and the contradicting ruling made by the Utah Court of Appeals by specifically citing to the United States Constitution and by citing to *Armstrong v. United States*, 364 U.S. 40 (1960).

In *Howell*, this Court refused to review an issue brought up for the first time on petition for certiorari. The Court justified its position:

> Petitioner's brief in the State Supreme Court did not properly present his claim as one arising under federal law. In the relevant argument, **he did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases.**

Id. (emphasis added). Accordingly the Court dismissed the writ of certiorari because the question before the Court was indeed a new question that had not been dealt with by the state courts. The instant petition requests the review of a question that has been dealt with by the Utah courts.

Respondent would have the Court deny certiorari based on the fact that the federal statute was not cited in the formal question presented to the Utah Supreme Court. Such a conclusion flies in the face of the spirit and purpose of this Court's ability to review a state supreme court's decision that fails to comply with the Fifth Amendment of the Constitution of the United States and legal precedent set by this Court. This Court has said:

> Although it would avoid uncertainty and the expenditure of much time and effort if litigants identified in the state courts precisely the provisions of the Federal Constitution or the federal statute on which they rely, **we have not insisted on such inflexible specificity**. The inevitable result is that at times there have been differences of opinion as to whether the state courts have been afforded a fair opportunity to address the federal question that is sought to be presented here. At the minimum, however, there should be no doubt from the record that a claim

> under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

Webb v. Webb, 451 U.S. 493, 501, 101 S. Ct. 1889, 1894 (1981) (emphasis added). This Court should not deny the Petitioner the opportunity to seek the Court's review of the Utah Supreme Court, when "the state courts have been afforded a fair opportunity to address the federal question that is sought to be presented here." *Id.*

The state provision against takings reads: "Private Property shall not be taken or damaged for public use without just compensation." Utah Const. Art. I §22. The nearly identical federal predecessor reads: " . . . [N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. The two provisions are virtually identical in word and effect. Under *Webb*, it would have only been duplicative, unnecessary, and time consuming to require the Petitioner to have specifically called out the federal provisions in its statements to the Utah Supreme Court.

This Court has held that citing the federal basis upon which a state claim is made is sufficient presentation of a federal claim to a lower court:

> [T]o meet this Court's standards for proper presentation of a federal claim . . . "**[a] litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief . . . by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal**

> **grounds**, or by simply labeling the claim 'federal.'" *Baldwin v. Reese*, 541 U.S. 27, 32, 124 S. Ct. 1347, 158 L.Ed.2d 64 (2004).

Howell, at 859 (emphasis added). In conjunction with its claim based on the state constitution, the Petitioner cited "the federal source of law on which [it] relies [and] a case deciding such a claim on federal grounds." *Id.* Under *Howell* and *Baldwin*, the Petitioner properly presented the question for which it now seeks this Court's review.

CONCLUSION

This Court has jurisdiction over this matter because the federal claim has already been presented to the Utah courts, accordingly this Court should grant certiorari. This Court is the Plaintiff's last hope in its effort to be compensated pursuant to the Constitution of the United States.

RESPECTFULLY SUBMITTED this 30th day of June, 2005.

B. RAY ZOLL
Counsel of Record
ZOLL & TYCKSEN, L.C.
5300 South 360 West, Suite 360
Murray, UT 84123
Telephone (801) 685-7800

Attorney for Petitioner Intermountain Sports, Inc.

DESERT MORNING NEWS, WEDNESDAY, JUNE 29, 2005

EDITORIAL

WELL, IF YOU HAVE A BETTER IDEA OF WHERE TO PUT HIS NEW NAIL SALON, I'D LIKE TO HEAR IT!
DEVELOPERS
SUPREME COURT
EMINENT DOMAIN RULING